

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35730

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.—LEASE EXEMPTION—LINE OF  
EASTSIDE COMMUNITY RAIL, LLC

Decided: May 1, 2013

This decision denies a request to stay the effective date of the exemption sought in this proceeding.

This proceeding concerns a 14.45-mile line of railroad between milepost 23.8 in Woodinville, Wash., and milepost 38.25 in Snohomish, Wash. (the Line). The Port of Seattle (Port) owns the real estate associated with the Line, Eastside Community Rail, LLC (ECRR) owns a permanent freight operating easement on the Line, and Ballard Terminal Railroad Company, L.L.C. (Ballard) operates the Line under an agency relationship/interim operating agreement with ECRR.

On April 2, 2013, Ballard filed a verified notice of exemption under 49 C.F.R. § 1150.41 to lease from ECRR and operate the Line.<sup>1</sup> The notice was served and published in the Federal Register on April 18, 2013 (78 Fed. Reg. 23331). The exemption is scheduled to become effective on May 2, 2013.

On April 25, 2013, the Port filed a petition asking the Board to impose a housekeeping stay, arguing that its stay request would also meet the traditional stay criteria, and extend the

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<sup>1</sup> Concurrently with the verified notice of exemption, Ballard submitted two petitions concerning an adjacent segment between milepost 23.8 in Woodinville and milepost 12.6 in Bellevue, Wash. (the adjacent segment), currently owned by the City of Kirkland and the Port in King County, Wash. Specifically, in Docket No. AB 6 (Sub-No. 465X), Ballard asks the Board to partially vacate the Notice of Interim Trail Use or Abandonment (NITU) issued by the Board for the adjacent segment in BNSF Railway Co.—Abandonment Exemption—In King County, Wash., AB 6 (Sub-No. 465X) (STB served Nov. 28, 2008). Also, in Docket No. FD 35731, Ballard has filed a petition for exemption pursuant to 49 U.S.C. § 10502 to acquire the residual common carrier rights and obligations, including the right to reinstitute rail service, over the adjacent segment. Ballard seeks to acquire the physical trackage assets of the adjacent segment and to provide common carrier rail service over this trackage. On April 19, 2013, the Board instituted a proceeding and requested comments on the petitions involving the adjacent segment.

May 2, 2013 effective date of the exemption to May 16, 2013. The Port and ECRR are parties to an Operations and Maintenance Agreement (O&M Agreement) governing maintenance, capital improvements, and day-to-day operations on the Line. The Port is concerned that the O&M Agreement differs from the proposed Ballard-ECRR lease (Lease). The Port argues that an extension would allow time for Ballard and the Port to agree on the terms so that the Lease meets all of the requirements of the O&M Agreement, particularly provisions pertaining to insurance and tort liability.

On the same day the Port filed its petition, Ballard filed a reply in opposition to the stay request. Ballard claims that the Port's concerns stem from private contractual matters between the Port, ECRR, and Ballard. According to Ballard, the Board has routinely held that the agency is not the appropriate forum for such matters. Further, Ballard represents that it will comply with the O&M Agreement.

### DISCUSSION AND CONCLUSIONS

The request for a stay of the effective date of the exemption will be denied. The Board typically does not grant a stay, under traditional stay criteria, unless it is necessary to prevent irreparable harm.<sup>2</sup> The Port has failed to demonstrate that it will be irreparably harmed if the notice goes into effect under the circumstances here.

Ballard has filed a verified notice of exemption to lease the Line from ECRR and operate over it. The exemption authority that will soon take effect is permissive in that it allows this transaction to proceed but does not require it to do so. Ballard can only proceed with its transaction, and therefore exercise the exemption authority, once there is a lease agreement in effect, which the parties continue to negotiate. Although the Port is concerned that the O&M Agreement may differ from the proposed Ballard-ECRR Lease, Ballard has advised that “[w]hile the Lease is still being reviewed by Ballard and ECRR, each of them fully expects to comply with its obligations under the [O&M Agreement].”<sup>3</sup> Moreover, according to Ballard, the current draft of the Lease provides that “Ballard agrees to be bound by and comply with ECRR’s obligations under the terms of the O&M Agreement.”<sup>4</sup> Therefore, irreparable harm has not been demonstrated here, nor is additional time necessary for the Board to consider the arguments raised here. Accordingly, the stay request will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>2</sup> See, e.g., Eighteen Thirty Group, LLC—Acquis. Exemption—In Allegany Cnty., Md., FD 35438, et al. (STB served Nov. 17, 2010); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); and Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>3</sup> Ballard’s Reply 2, April 25, 2013.

<sup>4</sup> Id.

It is ordered:

1. The petition for stay is denied.
2. This decision will be effective on its date of service.

By the Board, Daniel R. Elliott III, Chairman.